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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 GLADYS PELAYO,) NO. CV 16-1370-E
12)
13 Plaintiff,)
14)
15 v.) MEMORANDUM OPINION
16 Commissioner of Social Security,) AND ORDER OF REMAND
Administration,)
Defendant.)
_____)

17
18 Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS
19 HEREBY ORDERED that Plaintiff's and Defendant's motions for summary
20 judgment are denied, and this matter is remanded for further
21 administrative action consistent with this Opinion.
22

23 PROCEEDINGS
24

25 Plaintiff filed a Complaint on February 26, 2016, seeking review
26 of the Commissioner's denial of benefits. The parties filed a consent
27 to proceed before a United States Magistrate Judge on March 22, 2016.
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1 Plaintiff filed a motion for summary judgment on June 30, 2016.
2 Defendant filed a "Memorandum in Support of Defendant's Answer," which
3 the Court construes as Defendant's motion for summary judgment, on
4 August 3, 2016. The Court has taken both motions under submission
5 without oral argument. See L.R. 7-15; "Order," filed March 2, 2016.
6

7 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

8

9 Plaintiff asserts disability since May 18, 2009, based on several
10 alleged impairments, including an alleged lumbar impairment
11 (Administrative Record ("A.R.") 46-47, 61, 68-69, 208-14). Plaintiff
12 testified she suffers from constant radiating low back pain for which
13 she has undergone three epidurals that helped "just a little bit"
14 (A.R. 68-69). In denying disability benefits, the Administrative Law
15 Judge ("ALJ") found no severe lumbar impairment (A.R. 24-35). The
16 Appeals Council denied review (A.R. 1-4).
17

18 **STANDARD OF REVIEW**

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20 Under 42 U.S.C. section 405(g), this Court reviews the
21 Administration's decision to determine if: (1) the Administration's
22 findings are supported by substantial evidence; and (2) the
23 Administration used correct legal standards. See Carmickle v.
24 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,
25 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner,
26 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such
27 relevant evidence as a reasonable mind might accept as adequate to
28 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401

(1971) (citation and quotations omitted); see also Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

If the evidence can support either outcome, the court may not substitute its judgment for that of the ALJ. But the Commissioner's decision cannot be affirmed simply by isolating a specific quantum of supporting evidence. Rather, a court must consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [administrative] conclusion.

Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations and quotations omitted).

DISCUSSION

On the present record, the ALJ erred by finding non-severe Plaintiff's alleged lumbar impairment. Remand is appropriate.

Social Security Ruling ("SSR") 85-28¹ governs the evaluation of whether an alleged impairment is "severe":

An impairment or combination of impairments is found "not severe" . . . when medical evidence establishes only a slight abnormality or a combination of slight abnormalities

¹ Social Security rulings are binding on the Administration. See Terry v. Sullivan, 903 F.2d 1273, 1275 n.1 (9th Cir. 1990).

1 which would have no more than a minimal effect on an
2 individual's ability to work . . . i.e., the person's
3 impairment(s) has no more than a minimal effect on his or
4 her physical or mental ability(ies) to perform basic work
5 activities. . . .

6
7 If such a finding [of non-severity] is not clearly
8 established by medical evidence, however, adjudication must
9 continue through the sequential evaluation process.

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11 * * *

12
13 Great care should be exercised in applying the not severe
14 impairment concept. If an adjudicator is unable to
15 determine clearly the effect of an impairment or combination
16 of impairments on the individual's ability to do basic work
17 activities, the sequential evaluation process should not end
18 with the not severe evaluation step. Rather, it should be
19 continued.

20
21 SSR 85-28 at *2-4; see also Smolen v. Chater, 80 F.3d 1273, 1290 (9th
22 Cir. 1996) (the severity concept is "a de minimis screening device to
23 dispose of groundless claims") (citation omitted); accord Webb v.
24 Barnhart, 433 F.3d 683, 686-87 (9th Cir. 2005).

25
26 In the present case, the medical evidence does not "clearly
27 establish" the non-severity of Plaintiff's alleged lumbar impairment.
28 According to a July 19, 2011 radiology report, digital images of

1 Plaintiff's lumbar spine then revealed anterolisthesis, facet
2 arthrosis, disc narrowing and vacuum cleft lucency that may represent
3 annular derangement (A.R. 1157). Because of resolution loss on the
4 submitted images, the reviewing physician recommended repeating the
5 lateral lumbar view (A.R. 1156-57). No repetition appears to have
6 occurred.

7
8 In finding Plaintiff's alleged lumbar impairment non-severe, the
9 ALJ relied on the opinions of a consultative examining physician and
10 state agency physicians (A.R. 32-34). However, none of these
11 physicians appears to have reviewed the July 19, 2011 radiology report
12 described above (A.R. 99, 114-15, 127-28, 986-89). To the contrary,
13 the consultative examining physician upon whom the ALJ placed
14 principal reliance appeared to indicate that a (not yet undertaken)
15 review of imaging studies of Plaintiff's lumbar spine would be
16 necessary for a proper evaluation of Plaintiff's functional
17 limitations:

18
19 For better evaluation of the claimant's functional
20 assessment, may consider reviewing imaging studies of the
21 lumbar spine. There is tenderness in the lumbar spine and
22 pain with motion of the lumbar region (A.R. 989).

23
24 Finally, the testimony of the medical expert also supports the
25 conclusion that the medical evidence does not "clearly establish" the
26 non-severity of Plaintiff's alleged lumbar impairment. Although this
27 expert (a psychiatrist) conceded that physical problems were "not my
28 field," the expert testified from a review of the medical records that

1 Plaintiff "has a great deal of physical problems, orthopedic problems,
2 osteoarthritis, rheumatoid arthritis, disorders of the spine . . .
3 lumbar disc disease, and other physical problems" (A.R. 61).
4

5 The Court is unable to deem the above discussed error to have
6 been harmless. See generally, McLeod v. Astrue, 640 F.3d 881, 888
7 (9th Cir. 2011). Because the circumstances of this case suggest that
8 further administrative review could remedy the error, remand is
9 appropriate. Id. at 888; see also INS v. Ventura, 537 U.S. 12, 16
10 (2002) (upon reversal of an administrative determination, the proper
11 course is remand for additional agency investigation or explanation,
12 except in rare circumstances); Dominquez v. Colvin, 808 F.3d 403, 407
13 (9th Cir. 2015) ("Unless the district court concludes that further
14 administrative proceedings would serve no useful purpose, it may not
15 remand with a direction to provide benefits"); Treichler v.
16 Commissioner, 775 F.3d 1090, 1101 n.5 (9th Cir. 2014) (remand for
17 further administrative proceedings is the proper remedy "in all but
18 the rarest cases"); Harman v. Apfel, 211 F.3d 1172, 1180-81 (9th
19 Cir.), cert. denied, 531 U.S. 1038 (2000) (remand for further
20 proceedings rather than for the immediate payment of benefits is
21 appropriate where there are "sufficient unanswered questions in the
22 record").

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1 **CONCLUSION**

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3 For all of the foregoing reasons,² Plaintiff's and Defendant's
4 motions for summary judgment are denied and this matter is remanded
5 for further administrative action consistent with this Opinion.
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7 LET JUDGMENT BE ENTERED ACCORDINGLY.
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9 DATED: August 12, 2016.
10

11 /s/
12 CHARLES F. EICK
13 UNITED STATES MAGISTRATE JUDGE
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25 ² The Court has not reached any other issue raised by
26 Plaintiff except insofar as to determine that reversal with a
27 directive for the immediate payment of benefits would not be
28 appropriate at this time. "[E]valuation of the record as a whole
creates serious doubt that [Plaintiff] is in fact disabled."
Garrison v. Colvin, 759 F.3d 995, 1021 (9th Cir. 2014).